Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

DAVID MANSON ET AL

PETITIONERS

V.

ANCA STACESCU ET AL

RESPONDENTS

On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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96 pp

QUESTION PRESENTED

Whether given the absence of any explicit or implied federal-state conflict under the RICO statutes, 18 U.S.C. 1961 et seq. with regards to corporate governance, whether the Second Circuit should have created federal common law instead of applying Connecticut law as established and articulated by the Supreme Court of Connecticut granting direct action to a shareholder as an exception to the general rule.

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LIST OF PARTIES

DAVID MANSON; MARK MANSON,
PETITIONERS,

V.

ANCA STACESCU; DAVID FITZPATRICK; GIULIO MONACO; TRAGER & TRAGER; WESTFIELD MANAGEMENT, INC.; JOHN KALAKAY; JEFFREY GREIVES; JOHN J. STAVOLA; RICHARD WINTER, KENNETH REGAN, LAWRENCE BRAUNER; DONALD LUZETSKY; FRED PAOLETTI; BRENNAN, MCNAMARA, & BALDWIN, P.C.; GENERAL ELECTRIC SUPPLY COMPANY; CAPITAL LIGHT & SUPPLY, INC.; WARREN PFAFFENBERGER; KATHLEEN FITZPATRICK MIRANTI; DANIEL BRENNAN, Esq.; DAVID SHAW; JOHN A. STAVOLA; CONNECTICUT NATIONAL BANK; GEORGE GEIGNETTER; LOUIS R. MARTINO; DONALD PETITO; J.C. PENNY CO.; SHAWMUT BANK, NA, Shawmut Bank Connecticut, National Association,
RESPONDENTS

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RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

David Manson and Mark Manson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B infra) is reported at 11 F.3rd 1127 (1993). The opinion of the district court (App. A infra) is reported at 823 F.Supp. 76 (D. Conn. 1993).

JURISDICTION

The court of appeals entered its judgment on December 13, 1993. The petition for rehearing was denied on February 28, 1994 (App. D infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case originated in the Federal District Court in Connecticut and was brought under 18 U.S.C. §§ 1961-68 (the RICO statutes) and 28 U.S.C. § 1331. The question before this Court is whether there is anything in those statutes which warrants abrogation of articulated state law on the power and duties of a

corporate officer or director (App. C infra).

STATEMENT

Plaintiffs, David Manson and Mark Manson, sued the various defendants in Federal District Court in Connecticut on October 19, 1992, under the RICO statutes and for various common law claims. After various amended complaints and motions to dismiss were filed, the District Court (Eginton, J.) rendered its decision on March 23, 1993 with judgment entered on March 30, 1993. The District Court found that the plaintiffs lacked standing as shareholder employee or creditor of the Connecticut corporation, Stavola-

Manson Electrical Construction, Inc., to bring suit. The issue of standing was the sole issue decided by the district court in its initial decision. The plaintiffs then filed timely motions for reconsideration and to amend.

The plaintiffs then appealed to the Second Circuit Court of Appeals on the issue of standing and the right to amend the complaint if that was necessary which the appellants denied. The Second Circuit Court of Appeals (Timbers, Meskill and Altimari, Js) affirmed the District court judgment in all respects.

The facts as alleged in the final complaint are voluminous. As they bear

on the issue of this ultimate appeal, the petitioners would assert the following: David Manson was a 50% shareholder in a Connecticut corporation of two shareholders, two directors, two officers. He held each of those positions. Every other shareholder, officer or director is alleged to have looted the corporation of at least $400,000. The corporation is closed, and never issued a dividend. The mastermind of the various schemes to loot the corporation was the other director and real party in interest, Jay Stavola, for whom the corporation is named along with the petitioners. The other

defendants were all accomplices in the breach of an officer or director's fiduciary duties which may be subsumed under the general category of embezzlement.

The corporation was placed in receivership shortly after David Manson had filed a derivative action in Superior Court in Connecticut against most of the non-attorney defendants. That action was dismissed after the receiver did not prosecute the action for reasons alleged in the complaint. The derivative suit was also dismissed in defiance of Connecticut General Statute 52-572(j) which requires the receiver to give

notice to the court that appointed him and without notice to the shareholders. To this day the receiver has not paid a dime to any creditor including the IRS or a shareholder of the corporation.

A. CONNECTICUT LAW WITH REGARDS TO THE POWERS AND DUTIES OF OFFICERS AND DIRECTORS OF A CONNECTICUT CORPORATION

The petitioners contend that under Connecticut law they have a direct cause of action against officers and directors of the corporation named as defendants. Paragraph 104 of the complaint states explicitly that Jay Stavola, the other director, was the mastermind of various schemes to loot the corporation and enrich himself and others. In Yanow v.

Teal, 178 Conn. 261, 281-282 (1978), the Connecticut Supreme Court ruled that a direct cause of action existed for a shareholder if an officer or director looted the corporation or concealed financial transactions. In Pacelli Bros. Transporation, Inc. v. Pacelli, 189 Conn. 401, 407-409 (1983), the same court ruled that a direct cause of action was not limited to oppression of minority shareholders but could even be brought by majority shareholders since the perpetrator of the looting was an officer and director who held a one-third interest in the corporations.

As the Connecticut Appellate Court,

the intermediate court of appeals in Connecticut, in summarizing the law on direct action suits by shareholders, stated: "Authority exists in this state for officers, directors, and majority shareholders to be held personally liable for breach of fiduciary duty when evidence shows a misappropriation of corporate funds for personal benefit and subsequent fraudulent concealment." Banks v. Vito, 19 Conn. App. 256, 262 (1989) (citations omitted). In the superior courts in Connecticut the plaintiffs would have had a right to proceed in a direct action suit versus filing a derivative action, with all its

prerequisites. Inotherwords, the highest court in Connecticut has articulated an exçeption to the general rule that a shareholder in a corporation must proceed with a derivative action when facts indicate a missappropriation of funds and/or fraudulent concealment of corporate transactions by a corporate directors or officer. In other situations the general rule requiring a derivative action would apply.

Of course the case brought before the district court in Connecticut was not one of diversity but a federal question under the RICO statutes. The petitioners nevertheless assert that Connecticut law

should be respected. The Second Circuit chose to ignore the holdings of the Connecticut Supreme Court and as will be seen the holdings of the United States Supreme Court.

B. PROCEEDINGS BELOW

The Second Circuit in its opinion at page 43 app. infra cited Yanow v. Teal Industries, and recognized that standing would exist under Connecticut law for the petitioners but found Connecticut law was not controlling (significantly this court of appeals did not mention Pacelli Bros. Transporation, Inc., supra, in which the plaintiffs were the majority shareholders in the corporation and the perpetrator of

the looting a director, officer and 1/3 owner of the corporate shares):

> This Connecticut Supreme Court decision concerning standing to assert a state law claim, however, does not control the instant case, which involves the interpretation of a federal statute and raises important questions of federal policy. There are sound reasons for limiting standing under RICO to plaintiffs whose injuries are personal and directly caused by the RICO violations, particularly when the primary victim of the RICO conspiracy is a corporation.

The Second Circuit chose to ignore the holdings of the highest court in Connecticut. The Second Circuit has not

articulated what federal policy in the RICO statutes mandates abrogation of state law on corporate governance, particularly when a clear exception to the general rule exists requiring a derivative action be filed.

REASONS FOR GRANTING PETITION

The petitioners contend there are more than sufficient grounds for granting this petition for certiorari. The opinion of the Second Circuit is not only in conflict with decisions in other federal circuit court of appeals, especially the Third Circuit, but perhaps, even more importantly, flies in the face of a long line of decisions of

this Court regarding respect for the law of our sister states absent an articulated federal policy explicit or implicit that is in conflict.

I. The Court of Appeals' Decision Conflicts With the Third Circuit and Other Circuits of Appeal

The Second Circuit's decision to ignore the holdings of the Connecticut Supreme Court with regards to direct action versus derivative action contrasts with the respect other courts of appeals have had for state law as the ultimate authority on corporate governance. As the Third Circuit stated in In Re Sunrise Securities Litigation, 916 F.2d 874, 879 (1990):

Plaintiffs were allegedly injured in Florida by the former directors, officers, auditors, and attorneys of a Florida corporation. "Corporations are creatures of state law," Cort v. Ash, 422 U.S. 66, 84, 95 S.Ct. 2080, 2090, 45 L.Ed.2d 26 (1975), and unless state law on the issue of the derivative nature of plaintiffs' claim is inconsistent with the federal policy underlying RICO, it should not be displaced simply because plaintiffs base their claim on a federal statute. See Burks, 441 U.S. at 478-79, 99 S.Ct. at 1837-38; id. at 486, 99 S.C. at 1841 (federal courts should apply state law -- to extent it is consistent with federal policy -- in deciding power of corporate directors to discontinue

shareholders' derivative suit alleging violations of federal law).

The Third Circuit in a RICO case examined Florida law and arrived at its decision consonsant with the decision of the Second Circuit but based on Florida law not federal common law. The overriding principle in this ultimate appeal is respect for state law. There exists nothing in the RICO statutes that indicates Congressional interest in determining law on corporate governance.

In Whalen v. Carter, 954 F.2d 1087 (1992) the Fifth Circuit in a RICO case

noted, "The remaining question is whether Lousiana law affords the plaintiffs a private right of action. We conclude that it does not." Again, this circuit looked to state law.

In Sax v. Word Wide Press, Inc., 809 F.2d 610 (1987) the Ninth Circuit examined Montana law to determine whether the shareholder -plaintiff had a direct cause of action under any exceptions to the general rule requiring derivative action and determined he had not. Again this appeals court examined state law to determine its findings.

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS AND AT VARIANCE WITH ESTABLISHED PRECEDENCE OF THIS COURT

In deciding whether Connecticut law is to be replaced by federal common law, the first level of inquiry is to look to the RICO statutes themselves (18 U.S.C. §§ 1961-68) to see if Congress manifestly intended to preempt the field on powers and duties of directors and officers of corporations.

The next level of inquiry, since there is no indication of preemption of the field or even any federal-state conflict, is to inquire whether Congress might have intended to oust state authority on corporate governance as part of its dormant powers under the Commerce Clause implying a wish to occupy the

field. A perusal of the legislative history of the RICO statutes does not indicate even by implication Congressional intent to oust state authority on matters of corporate governance. As the United States Supreme Court noted in Maryland v. Louisiana, 451 U.S. 725, 751 (1980), "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to replace state law." As the Court also stated in Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-641 (1980):

> The vesting of jurisdiction in the federal courts does not in and of itself give

rise to authority to formulate federal common law, United States v. Little Lake Misere Land Co., 412 U.S. 580, 591 (1973), nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts. Rather, absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admirality cases. In these instances, our

> federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control. (footnotes omitted)

See also, in general, Chermerinsky, Federal Jurisdiction, Section 6.2 (Little, Brown & Company 1989).

In Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966), this Court outlined the standard the petitioners contend is germane to the instant matter. This case involved a suit by private parties as to leases under the Federal

Mineral Leasing Act of 1930 (30 U.S.C. § 181 et seq.). Overruling the Federal District Court in Louisiana, the Fifth Circuit Court of Appeals reasoned given the pervasive federal regulations, Louisiana law on lease-holding would thwart the purpose of the federal enactment. The Court stated:

> We focus now on the central question in the case. In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the

Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that "Congress acts ... against the background of the total corpus juris of the states ...." Hart & Wechsler, The Federal Courts and the Federal System 435 (1953). Because we find no significant threat to any identifiable federal policy or interest, we do not press on to consider other questions relevant to invoking federal common law, such as the strength of the state

> interest in having its own rules govern, cf. United States v. Yazell, 382 U.S. 341, 351-353, the feasibility of creating a judicial substitute, cf. U.A.W. v. Hoosier Cardinal Corp., 383 U.S. 696, 701, and other similar factors.

Id. at 68.

In the cases just cited the federal statutes had little or no relevance to state corporate law. Other cases at the highest level have dealt with the conflict of federal and state law as to corporate governance. In Santa Fe Industries, Inc. v. Green, 462 U.S. 462 (1977), the United States Supreme Court reversed the Second Circuit Court of Appeals' finding that a breach of

fiduciary duty by majority shareholders against minority shareholders without a charge of disclosure or misrepresentation stated a cause of action under 10b-5 of the Securities Act of 1934. "Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden" Id. at 479. In Cort v. Ash, 422 U.S. 66 (1975), the Court once again failed to discover Congressional intent to allow a private cause of action under 18 U.S.C. §

610, a criminal statute forbidding corporations making a contribution or expenditure for any election of presidential or vice-presidential electors. The Court found any private remedy is available, if at all, under Delaware law governing corporations. In reaching its decision the Court again looked to congressional intent to vest corporate shareholders with a right under 18 U.S.C. § 610. Id. at 82. The Court also looked to see whether the private right "would not aid the primary goal," Id. at 84, and finally whether a remedy is created by state law. As the Court noted, "Corporations are creatures of

state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." Id.

Finally, in Burks v. Lasker, 441 U.S. 471 (1979) the United States Supreme Court once again overturned a Second Circuit Court of Appeals case finding a private right of action under the Investment Company Act of 1940 (ICA) and the Investment Advisors Act (IAA) of 1940. The Court formulated the following

test on application of state or federal law as to disinterested directors' ability to terminate derivative suits: 1) is there an articulated state law, 2) if so, was state rule consistent with the policy of the federal acts. In the instant petition not only is there an articulated policy in Connecticut as to direct action, not only is there almost nothing in the statutes or legislative history to indicate any implied attempt of Congress to regulate the field, but also the Second Circuit has failed to articulate what important federal policy dictates abrogation of state law. Connecticut law holds the injury to

shareholder David Manson is direct. The Connecticut Supreme Court has simply recognized that in a corporation of two shareholders, two directors and two officers "it approaches the fictional" to claim the injuries alleged were derivative in nature. See American Law Institute, Principles of Corp. Governance § 7.01 at 609 (Proposed Final Draft).

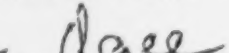
The Second Circuit in a previous RICO case relied heavily on New York state law and found it consistent with the general principles of common corporate law as applied under federal statute. Ceribelli v. Eighanoyan, 990 F.2d 62, 65 (1993).

In the instant petition, however, the general common law as articulated by the Second Circuit conflicts with Connecticut law on corporate governance. The petitioners contend that unless the RICO statutes themselves indicate a wish of Congress, explicit or implicit, to control the field then Connecticut law should apply. This Court has ruled so on numerous occasions as cited above. Corporations are creatures of state law.

CONCLUSION

For the reasons stated above, the petitioners request their Writ of Certiorari be granted.

THE PETITIONERS

BY 

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APPENDIX

A. FEDERAL DISTRICT COURT RULING

David MANSON and Mark Manson
v.
Anca STACESCU, et al.
Civ. No. 5-92-600 (WWE).
United States District Court,
D. Connecticut,
March 24, 1993

Personal obligor on loan to company, and company's director, president and 50% shareholder, who was also personal obligor on loan, brought suit against 26 defendants, alleging violations of Racketeer Influenced and Corrupt Organizations Act (RICO) in connection with alleged scheme to loot company to point of bankruptcy. On motions of 21 defendants to dismiss, the District Court, Eginton, Senior District Judge, held that plaintiffs lacked standing.

Motions granted.

RULING ON MOTIONS TO DISMISS

EGINTON, Senior District Judge.

Plaintiffs David and Mark Manson bring this action pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, against twenty-six defendants. Twenty-one defendants have filed motions to dismiss under Fed.R.CIv.P. 12(b) on the grounds that the complaint fails to state a claim upon which relief may be granted. For the reasons set forth below, the motions will be granted.

Facts

In accordance with the standard for determining a motion to dismiss as set

forth below, the court accepts the allegations in the complaint as true for the purposes of this motion. All of the disputes in this case arise out of alleged abuses to the Staolva-Manson Electrical Construction Company, Inc. ("Company"). Plaintiff David Manson is a 50% shareholder, director,and President of the Company, in addition to being a personal obligor on a $450,000 loan to the Company, Plaintiff Mark Manson is a personal obligor on the same loan to the Company.

The Company was incorporated in September 1985. Although defendant Jay Stavola's name is associated with the

Company, he is neither an officer nor a shareholder. However, he is a director of and a real party in interest in the Company. Plaintiffs claim that the defendants, principally led by Jay Stavola, committed various felonious acts including bribery of a labor union official, attempted extortion, money laundering, threatened murder, credit car fraud, bankruptcy fraud, obstruction of justice, mail fraud, and conspiracy in violation of the RICO statute. All of these acts were part of a scheme through which defendants allegedly looted the Company of the point of bankruptcy in order to line their own pockets.

Plaintiff David Manson began to have suspicions that something was awry with the Company int he fall of 1987. At that time, he tried to examine Company signature cards and resolutions at defendant Connecticut National Bank to confirm that unauthorized checks were being issued from Company's accounts. However, the bank refused to allow Manson to examine these documents.

In July 1988, the Company was in serious financial trouble and unable to pay its debts. Thus, David Manson, as President of the Company, petitioned for chapter eleven bankruptcy relief. Plaintiff also filed a derivative action

on behalf of the Company.

Since defendants' fraudulent shceme would be exposed in the course of the bankrtupcy proceeding, plaintiffs contend that defendants conspired to get the petition dismissed and the Company placed into a receivership. As part of this plan, plaintiffs contend defendant David Fitzpatrick, attorney for Jay Stavola and several other defendants, manufactured evidence and submitted it to the bankruptcy court in order to persuade the court to dismiss the petition, thereby obstructing justice and committing a fraud on the court.

Subsequently, the petition was

dismissed and Fitzpatrick asked the court to approve defendant Richard Winter as a receiver for the Company. Plaintiffs allege that as part of the coverup and with the intention of protecting his clients, Fitzpatrick selected Winter with the understandint that Winter would not seek to recover debts owed to the Company by Fitzpatrick's clients or settle the debts for substantially less than the amounted owed. In January 1989, the court approved the receiver and placed the Company into receivership.

Since being appointed receiver, Winter has failed to act in the best interests of the Company and pursued only

two actions on behalf of the Company. In both these cases, Winter settle for substantially less than the amount owed. When plaintiff David Manson inquired about the settlements being made, defendant Jay Stavola and others threatened plaintiff with financial ruin and murder if he refused to "back off." In addition, plaintiffs argue that because Winter allegedly is helping to cover up the fraudulent scheme of defendants, he intentionally has failed to pursue the derivative action filed by plaintiff or ask for its dismissal. As a result, plaintiffs contend they cannot obtain relief under state law because the

statute of limitations has run.

Plaintiffs alleged that the above mentioned acts injured them personally, as well as the Company. Specifically, because the Company defaulted on its loan, both plaintiffs as obligors are facing foreclosure on their homes and deficiency judgment proceedings. In addition, plaintiff David Manson alleges that as a result of defendant's acts, his business credit and reputation are ruined and that his source of income eliminated.

Discussion

The function of a motion to dismiss is "merely to access the legal feasibility of the complaint, not to

assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). When deciding a motion to dismiss, the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the nonmoving party. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99,

101-102, 2 L.Ed.2d 80 (1957).

Standing

A threshold issue in this case is whether plaintiffs having standing to bring suit under RICO. Defendants claim that all of plaintiffs' injuries are derivative in nature, and therefore no actionable under the statute. The standing provision of RICO provides that "[a]ny person injured in his his business or property by reason of a violation of [18 U.S.C. § 1962] may sue therefor ... and shall recover threefold the damagse he sustains." 18 U.S.C. § 1964(c). The Supreme Court has interpreted the causation requirement of the statue as

limiting standing to plaintiffs whose injuries were proximately caused by the acts constituting the RICO violation--the so called predicate acts. Holmes v. Securities Investor Protection Corp. ---- U.S. ----, ----, 112 S.Ct. 1311, 1318, 117 L.Ed.2d 532 (1992); see also Sedima, S.P.R.C. v. imrex Co., 473 U.S. 479, 496 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985) (RICO) plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.")

A central element of proximate cause is a showing of some "direct relation

between the injury asserted and the injurious conduct alleged." Holmes, ---- U.S. at ---- - ----, 112 S.Ct. at 1318. In the Second Circuit, the acts constituting the RICO violation proximatelly cause a plaintiff's injury if they are a "substantial factor in the sequence of responsible causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence." Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 23-24 (2d Cir. 1990).

There are sound reasons for limiting standing to plaintiffs whose injuries were proximately caused by the RICO violations, particularly when the primary

victim of the RICO conspiracy is a corporation. First, the proximate cause requirement serves the interests of judicial economy. "[R]ecognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." Holmes, ---- U.S. at ----, 112 S.Ct. at 1318. When restricting standing to the corporate victim, the court need only determine one damage award, which will restore the company and its shareholders, creditors, and employees. Because

"[s]uits by shareholders, guarantors, and the like may well be efforts to divert the debtor's assets--to pay off one set of creditors ... while keeping the proceeds out of the hands of the first's other creditors," this proximate cause requirement also ensures the fairest result to all. Mid-State Fertilizer v.Exchange National Bank, 877 F.2d 1333, 1336 (7th Cir. 1989). Finally, restricting standing to those persons most directly injured by the RICO violations prevents the potential flood of litigation that would result from a "but for" causation requirement. Holmes, ---- U.S. at ---- n.10, ----, 112 S.Ct.

at 1316 n.10, 1316.

[1] Thus plaintiffs in this case have standing only if they have alleged injuries proximately caused by defendants' fraudulent scheme. Plaintiffs bring suit in several capacities. First, they sue as creditors of the Company. Mid-State Fertilizer, 877 F.2d at 1336. Because the Company could not pay its loan obligations, plaintiffs, as obligors on the loan, became personally responsible for its payment.

Generally, creditors of a bankrupt company have been denied standing under RICO because their injuries are

derivative in nature. In Mid-State Fertilizer, for example, plaintiffs were managers and sole shareholders of a company and personaly guaranteed loans made to the company. When the company became insolvent, allegedly because of the defendant bank's participation in a RICO conspiracy, plaintiffs became liable for the company's debts. The court held that plaintiffs did not have standing to sue under RICO because their injuries were not proximately caused by the RICO violations. 877 F.2d at 1335-36.

The Second Circuit has recognized a narrow exception to the general rule denying creditors standing. In Bankers

Trust Co. v. Rhoades, 859 F.2d 1096, 1100-01 (2d Cir. 1988), cert. denied, 490 U.S. 1007, 109 S.Ct. 1642, 104 L.Ed.2d 158 (1989), a creditor of a bankrupt company as granted standing because it had suffered a direct injury. Specifically, it had been forced to defend against frivolous lawsuits filed by plaintiffs, and thus, suffered monetary loss over and above that caused by the bankruptcy of the company.[1]

[1] Judge Posner recently explained the holding in Bankers Trust. "Bankers Trust does not hold that if RICO defendants plunder a corporation that they control, driving it into bankruptcy, in order to elude a specific, pesky creditor, the creditor has standing to maintain a suit under RICO. The first level of injury is to the corporation, and the creditor suffers only because he has a claim

In this case, the injury to plaintiffs as obligors was only indirectly caused by defendants' scheme. The Company was the person directly harmed by the defendants' scheme. Indeed, the racketeering acts were targets at the Company's funds--not at plaintiffs. Absent the defendants' looting of corporate funds, the Company would be able to pay its debts.

(footnote 1 cont'd) against it. The point of Bankers Trust is that the plundering of the bankrupt corporation was only one means by which the defendants tried to thwart the creditor-plaintiff, in addition they harassed plaintiff with frivolous lawsuits." Wooten v. Loshbough, 951 F.2d 768, 771 (7th Cir. 1991).

"Guarantors are contingent creditors. If the firm stiffs a creditor, that creditor can collect from the guarantor; the creditor can collect from the guarantor; the guarantor succeeds to the original creditor's claim against the firm." Mid-State Fertilizer, 877 F.2d at 1336. Although the complaint allegest that defendants' acts directly injured plaintiffs, it recites no facts to show a direct injury. Rather, the facts indicate that plaintiffs' injuries would be cured if the Company receovered its assets, because it then would be able to pay its debts, thereby relieving plaintiffs of their obligation. Thus,

neither plaintiff has satisfied the proximate cause requirement and, therefore, they do not have standing to sue under RICO as obligors.

[2, 3] Likewise, plaintiff David Manson does not have standing to sue as a shareholder of the Company. Generally, shareholders are prohibited from bringing individual sutis under RICO. Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849 (2d Cir. 1986), cert. denied, 479 U.S. 987, 107 S.Ct. 579, 93 L.Ed.2d 582 (1986). This is true even when the plaintiff is the sole sharehodler of the injured corporation. Sound Video Unlimited, Inc. v. Video Shack, Inc., 700

F.Supp. 127, 136 (S.D.N.Y. 1988); see also Sirinakis v. Colonial Bank, 600 F.Supp. 946, 953 n.10 (S.D.N.Y. 1984) (president and principal shareholder of shipping company could not claim company's tort and contract damages as his own).

There are cases in the Second Circuit in which a shareholder was permitted to bring a RICO action. In these cases, the plaintiffs were harmed directly, as well as by the economic downfall of the corporation. For example, minority shareholders have been granted standing under RICO when a majority shareholder has violated a

fiduciary duty owed directly to plaintiff, in addition to committing a fraud on the company which caused plaintiff's stock to depreciate in value. See Sound Video Unlimited, Inc., 700 F.Supp. at 136; Fidelis Corp.v. Litton Industries, Inc., 293 F.Supp. 164, 168-69 (S.D.N.Y. 1068); see also Yanow v. Teal Industries, Inc., 178 Conn. 262, 282 n.9, 422 A.2d 311 (1979) ("If the controlling majority stockhoder seeks to injure the minority stockholder through the means of looting the corporation or so wrecking it that the minority stockholder would get nothing out of his assets, the claim resulting therefrom is sufficient to

constitute an individual action.").

In this case, no breach of fiduciary duty is alleged. The facts in the complaint show that plantiff's injury as a stockhodler was caused by the bankrupty of the Company. Defendants' conduct was designed to injure the Company. Thus, plaintiff's harm is derivative in nature. Because the complaint fails to allege any direct injury to plaintiff as a stockholder, harm separate and distinct from the injury to the Company, plaintiff does not have standing to sue under RICO in this capacity.

[4] Finally, plaintiff David Manson

does not have standing to sue as President and director of the Company. Employees of a bankrupt company frequently have been precluded from bringing a civil RICO action because their injuries were not proximately caused by the alleged misconduct. This is true even if they were harassed and fired for trying to report the fraud. For example, the court in Willis v. Lipton, 947 F.2d 998, 1000 (1st Cir. 1991), held that the plaintiff did not have standing under RICO because his loss of employement, damage to reputation, and legal expenses were not proximately caused by the alleged RICO violations.

See also Warren v. Manufacturers Nat'l Bank of Detroit, 759 F.2d 542, 544-45 (6th Cir. 1985) (sole owner of corporation who lost employment when corporation was forced into bankruptcy by RICO violations cannot recover for loss of employment). In Norman v. Niagara Mohawk Power Corp., 873 F.2d 634, 635-37 (2d CIr. 1989), the court denied standing to an employee who was suffering intimidation and harassment for blowing the whistle on his employer's fraudulent activity. See also Nodine v. Textron, Inc., 819 F.2d 347, 348-49 (1st Cir. 1987) (no standing for employee who was fired for reporting a RICO scheme because

his injury did not flow directly from the predicate acts); Hecht, 897 F.2d at 24 (stockbroker was "'neither the target of the racketeering enterprise nor the competitor[] nor the customer [] of the racketeer[s],'" thus, his loss of income was not proximately caused by the RICO violations) (citation omitted).[2]

[2] Manson has alleged that defendants obstructed justice in the course of covering up their fraudulent scheme. While the First Circuit has noted that when an employee alleges obstruction of justice, he might satisfy the direct injury requirement, the court did not elaborate on this point and dismissed the complaint because the plaintiff had waived his right to bring a claim for obstruction of justice. Nodine, 819 F.2d at 349 n.3. Similarly, in Kramer v. Bahan Aerospace Corp., 912 F.2d 151, 155-56 (6th Cir. 1990), the court acknowledged that an obstruction of justice claim may be sufficient to grant

[5] The complaint alleges few facts to support plaintiff's allegation of direct injury. Rather, most of the complaint describes the various methods defendants used to steal from and bankrupt the Company. The only acts directed at plaintiff were threats made

(footnote 2 cont'd) standing to an employee discharged for reporting a fraud, but dismissed the complaint because the plaintiff had not adequately demonstrated defendants' specific intent to obstruct justice. This court declines to elaborate on this dicta because it is unclear how a claim of obstruction of justice might satify the proximate cause requirement, and because the Second Circuit has consistently resisted granting standing to plaintiffs like Manson.

to intimidate plainitff and stop him from investigating the alleged scheme. The murder threat does not cause the type of injury protected by the civil RICO statute. Business and property are the only interests protected by RICO. Bennett v. Centerpoint Bank, 761 F.Supp. 908, 916 (D.N.H. 1991), aff'd, 953 F.2d 634 (1st Cir. 1991); see also Rylewicz v. Beaton Services, Ltd., 698 F. Supp. 1391, 1395-96 (N.D.Ill. 1988) ("The phrase 'business or property' excludes personal injuries or political damages."), aff'd, 888 F.2d 1175 (7th Cir. 1989); Grogan v. Platt, 835 F.2d 844, 847 (11th Cir. 1988) ("In our view, the ordinary meaning of

the phrase 'injured in his business or property' excludes personal injuries, including pecuniary losses therefrom."), cert. denied, 488 U.S. 981, 109 S.Ct. 531, 102 L.Ed.2d 562 (1988); Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1169 (3d Cir. 1987) (mental distress is not actionable injury under RICO). Similarly, the threat of finanial ruin did not cause an actionable injury to Manson. This threat was similar to the threats and carrying out of threats to discharge employees who reported fraudulent schemes or refused to participate in a RICO conspiracy, in that it was made after the company was looted

and for the purpose of preventing plaintiff from exposing the fraud. See Nodine, 819 F.2d 347; Hect, 897 F.2d 21. While the threat in this cause was directed at plaintiff, the RICO scheme alleged was directed at the Company. Thus, any injury resulting from the threat was an indirect consequence of the defendants' scheme to loot the Company and line their own pockets. Plaintiff's loss of income from his role as President and director, therefore, was an indirect result of the conspiracy and subsequent bankruptcy of the Company.

Conclusion

For the reasons set forth above, the

court holds that plaintiffs do not have standing to sue under RICO because their injuries were not proximately caused by the alleged RICO conspiracy.

Accordingly, the motions to dismiss [41, 73, 115, 126, 141, 144, 159, 161, 177, 179, 181, 183, 185, 187, 189, 200, 203, 215, 200] are GRANTED.

B. SECOND CIRCUIT COURT OF APPEALS RULING

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 338—August Term 1993

(Argued November 24, 1993

Decided December 13, 1993)

Docket No. 93-7417

DAVID MANSON; MARK MANSON,

Appellants,

—v.—

ANCA STACESCU; DAVID FITZPATRICK; GIULIO MONACO; TRAGER & TRAGER; WESTFIELD MANAGEMENT, INC.; JOHN KALAKAY; JEFFREY GREIVES; JOHN J. STAVOLA; RICHARD WINTER; KENNETH REGAN; LAWRENCE BRAUNER; DONALD LUZETSKY; FRED PAOLETTI; BRENNAN, MCNAMARA & BALDWIN, P.C.; GENERAL ELECTRIC SUPPLY COMPANY; CAPITOL LIGHT & SUPPLY, INC.; WARREN PFAFFENBERGER; KATHLEEN FITZPATRICK MIRANTI; DANIEL BRENNAN, ESQ.; DAVID SHAW; JOHN A. STAVOLA; CONNECTICUT NATIONAL BANK; GEORGE GEIGNETTER; LOUIS R. MARTINO; DONALD PETITO; J.C. PENNEY CO.; SHAWMUT BANK, NA, SHAWMUT BANK CONNECTICUT, NATIONAL ASSOCIATION,

Appellees.

Before:

TIMBERS, MESKILL, and ALTIMARI,
Circuit Judges.

Appeal from a judgment entered in the District of Connecticut, Warren W. Eginton, *District Judge*, granting appellees' motions to dismiss appellants' action which sought relief under RICO and denying appellants' motion for leave to amend their complaint. The court held that appellants do not have standing to commence an action under RICO and denied appellants' motion for leave to amend their complaint.

Affirmed.

H. OWEN CHACE, Branford, CT, *for appellants.*

DAVID P. ATKINS, Bridgeport, CT (Jacob D. Zeldes, Beverly S. Knapp, and Zeldes, Needle & Cooper, on the brief), *for appellee Trager & Trager.*

RONALD J. COHEN, New Haven, CT (Tyler Cooper & Alcorn, on the brief), *for appellee General Electric Supply Company.*

JAMES T. COWDERY, Robert W. Werner, and Chatigny & Cowdery, Hartford, CT, submitted a brief *for appellee Westfield Management, Inc.*

JOHN F. KALAKAY, Bridgeport, CT, submitted a brief pro se.

JAMES F. STAPLETON, and Day, Berry & Howard, Stamford, CT, submitted a brief *for appellees Richard Winter, Daniel E. Brennan, Jr., and Brennan, McNamara & Baldwin.*

ALAN I. SCHEER, Elliott B. Pollack, Joseph B. Burns, and Hoberman & Pollack, Hartford, CT, submitted a brief *for appellees Kenneth Regan and Capitol Light & Supply, Inc.*

RAYMOND W. GANIM, and Lisa A. Ricci-Knopf, Stratford, CT, submitted a brief *for appellee Warren Pfaffenberger.*

KATHLEEN F. MIRANTI, Trumbull, CT, submitted a brief pro se.

JOHN B. RIZO, SR., Plano, TX, submitted a brief *for appellees J.C. Penney Company, Inc. and Donald Petito.*

RICHARD P. SWANSON, Pamela C. Tames, and Reid & Priest, New York, NY, submitted an amicus brief *for GICC Capital Corp. in support of appellants.*

TIMBERS, *Circuit Judge*:

David Manson and Mark Manson (the Mansons) appeal from a judgment entered in the District of Connecticut, Warren W. Eginton, *District Judge*, dismissing their action which sought relief under the Racketeer Influenced

and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1988). The court held that the Mansons do not have standing to commence an action under RICO and denied the Mansons' motion for leave to amend their complaint to allege additional facts relating to standing. On appeal, the Mansons contend that the court erred in holding that they do not have standing under RICO and that the court abused its discretion in denying their motion for leave to amend their complaint.

We reject the Mansons' claims. We affirm the district court's judgment in all respects.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

The Mansons commenced this RICO action against twenty-six defendants for alleged abuses against the Stavola-Manson Electrical Construction Company, Inc. (the Company). David Manson is a director, president, and fifty percent shareholder of the Company. Appellee Anca Stacescu is the other fifty percent shareholder. David Manson and Mark Manson are personal obligors on a $450,000 loan to the Company.

The Mansons allege that appellees, who include persons both inside and outside the Company, engaged in a pattern of racketeering activity through a criminal enterprise masterminded by the other director of the Company, Jay Stavola. Appellees allegedly committed various felonious acts, including bribery of a labor union official, attempted extortion, money laundering, threatened murder, credit card fraud, bankruptcy fraud, obstruction of justice, mail

fraud, and conspiracy in violation of RICO. These acts allegedly were part of a scheme through which appellees looted the Company to the point of bankruptcy in order to enrich themselves.

In 1988, after the Company had sustained heavy losses, David Manson petitioned for chapter eleven bankruptcy relief and filed a derivative action on behalf of the Company. The Mansons allege that David Fitzpatrick, the attorney for Jay Stavola and several other appellees, manufactured evidence and submitted it to the bankruptcy court in order to persuade the court to dismiss the petition. After the court dismissed the petition, Fitzpatrick asked the court to appoint Richard Winter as the receiver for the Company and he was. Fitzpatrick allegedly selected Winter with the understanding that Winter either would not seek to recover debts owed to the Company by Fitzpatrick's clients or would settle debts for substantially less than the amounts owed.

Since being appointed receiver, Winter allegedly has failed to act in the best interests of the Company. Winter has pursued only two actions on behalf of the Company and settled both for substantially less than the amount owed. When David Manson inquired about these settlements, Jay Stavola and others allegedly threatened him with financial ruin and murder if he refused to "back off". The Mansons also allege that Winter is covering up appellees' fraudulent scheme by intentionally failing to pursue the derivative action filed by David Manson. The Mansons further allege that as a result they cannot obtain relief under state law.

The Mansons claim that appellees' acts injured them personally. David Manson claims that he has lost earnings and profits in the Company and has sustained injury to his

reputation and business credit. In addition, he and Mark Manson claim that they have sustained damages by virtue of their personal liability on the Company's $450,000 loan.

On March 23, 1993, the district court held that the case should be dismissed for want of standing. The court held that the Mansons do not have standing as creditors of the Company and that David Manson does not have standing either as a shareholder or as an employee of the Company. The Mansons subsequently moved for leave to amend their complaint to allege additional facts relating to standing. The court denied the Mansons' motion for leave to amend their complaint on the ground that it was moot. On April 27, 1993, the court entered an order dismissing the action as to all appellees.

On appeal, the Mansons contend that (1) the court erred in holding that the Mansons do not have standing to commence an individual RICO action regarding the looting of a company to which the Mansons are personal obligors on a loan and in which David Manson is a fifty percent shareholder and employee and (2) the court abused its discretion in denying the Mansons' motion for leave to amend their complaint.

II.

(A) *STANDING*

The standing provision of RICO provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains". 18 U.S.C. § 1964(c) (1988). The Supreme Court has interpreted this language as limiting standing to plaintiffs

whose injuries were caused proximately by the RICO predicate acts. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. ___, ___, 112 S. Ct. 1311, 1318 (1992). A central element of proximate cause is a showing of some "direct relation between the injury asserted and the injurious conduct alleged". *Id.*

The district court reasoned that the Company was the primary victim of the RICO conspiracy alleged by the Mansons and that the Mansons' injuries in their capacities as creditors, shareholder, and employee were derivative of the Company's injuries. The court held, therefore, that the Mansons' injuries were not caused proximately by the alleged conduct and that the Mansons do not have standing to seek relief under RICO. Our standard of review of the district court's holding, which is a ruling of law, is *de novo*.

(1) *Standing As Obligors*

The Mansons claim that they have standing as obligors on a $450,000 loan to the Company. Since the Company allegedly cannot pay its loan obligations, the Mansons are responsible personally for the repayment of this loan and have become creditors of the Company. Creditors of a bankrupt corporation, however, generally do not have standing under RICO. *E.g., Mid-State Fertilizer Co. v. Exchange Nat. Bank*, 877 F.2d 1333, 1336-37 (7 Cir. 1989). The creditor generally sustains injury only because he has a claim against the corporation. The creditor's injury is derivative of that of the corporation and is not caused proximately by the RICO violations. *Id.*

We have recognized a narrow exception to the general rule denying creditors standing. In *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1100-01 (2 Cir. 1988), *cert.*

denied, 490 U.S. 1007 (1989), we held that creditors of a bankrupt company had standing to bring an individual RICO action when they had sustained a direct injury. Specifically, the creditors in *Bankers Trust* were forced to defend against frivolous lawsuits filed to harass them and to cause them monetary loss over and above that caused by the company's bankruptcy. *Id.* at 1101. Furthermore, the defendants in *Bankers Trust* had made a fraudulent conveyance for the direct purpose of insulating the corporation from its creditors. *Id.*

Unlike the plaintiffs in *Bankers Trust*, the Mansons do not allege a direct injury. The alleged looting of the Company only harmed the Mansons indirectly. Furthermore, since the Mansons are personal obligors on a corporate bank loan and not primary creditors of the Company, the Mansons did not become liable until the looting of the Company rendered the corporation unable to pay its debts. If the Company were to recover its assets, the Mansons' injuries would be cured. The Mansons' injuries are even further down the chain of causation than those sustained by primary creditors.

We hold that the Mansons do not have standing in their capacities as obligors.

(2) *Standing As Shareholder*

The Mansons claim that David Manson has standing to sue as a fifty percent shareholder of the Company. A shareholder generally does not have standing to bring an individual action under RICO to redress injuries to the corporation in which he owns stock. *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2 Cir.), *cert. denied*, 479 U.S. 987 (1986). This is true even when the plaintiff is the sole shareholder of the injured corporation. *Sound*

Video Unlimited, Inc. v. Video Shack, Inc., 700 F. Supp. 127, 136 (S.D.N.Y. 1988). Since the shareholder's injury, like that of the creditor, generally is derivative of the injury to the corporation, the shareholder's injury is not related directly to the defendant's injurious conduct. *Holmes v. Securities Investor Protection Corp.*, *supra*, 503 U.S. at ___, 112 S. Ct. at 1318.

The Mansons claim that, by looting the Company, appellees violated their fiduciary duties to David Manson in his capacity as a shareholder. The Mansons assert that such a claim states a personal, not a derivative, cause of action. *Yanow v. Teal Industries, Inc.*, 178 Conn. 262, 281-83, 422 A.2d 311, 321-22 (1979) (holding that a minority shareholder had standing to assert state law claims against a majority shareholder who looted the corporation). The district court, however, held that the Mansons' complaint did not allege a breach of fiduciary duty and denied the Mansons' motion for leave to amend their complaint specifically to allege such a breach.

Even if the court had permitted the Mansons to amend their complaint to include such an allegation, David Manson would not have standing to assert a federal RICO claim. We recognized a special duty exception in the context of RICO actions in *Ceribelli v. Elghanayan*, 990 F.2d 62, 63-65 (2 Cir. 1993), but we suggested that that exception is limited to cases in which the shareholder sustains an injury that is separate and distinct from the injury sustained by the corporation. *Id.* at 64; *see also Vincel v. White Motor Corp.*, 521 F.2d 1113, 1121 (2 Cir. 1975) (holding that shareholders cannot assert a direct action when the duty owed to them is the same as that owed to the corporation).

In *Ceribelli*, the defendants fraudulently failed to disclose material information prior to the shareholders' purchase of their shares. *Supra*, 990 F.2d at 64. Unlike David Manson, the shareholder in *Ceribelli* was able to allege a breach of an independent duty owed to him in his capacity as a securities purchaser. We reasoned that, if the fraudulent activity had taken place after the purchase of the shares, at which point the shareholder would not have been owed an independent duty as a securities purchaser, a direct action by the shareholder would have been "doubtful". *Id.* Since the Mansons do not allege that any appellee owed David Manson an independent duty that is distinguishable from the duty owed to the corporation, the special duty exception that we recognized in *Ceribelli* does not apply to this case.

Furthermore, the Mansons cannot claim that any appellees owed David Manson a duty that was separate and distinct from the duty owed to the other shareholder. Courts have recognized an exception to the general rule of not recognizing a shareholder's individual claim where the injury sustained by the shareholder is separate and distinct from that sustained by other shareholders. *E.g.*, *Sax v. World Wide Press, Inc.*, 809 F.2d 610, 614 (9 Cir. 1987). Here, however, the other shareholder, Anca Stacescu, also sustained losses in the value of her shares. Even though Stacescu is alleged to have participated in some of the wrongdoing, she and David Manson have sustained the same injury with respect to the value of their shares and both would be made whole by a derivative action. *Id.* at 614 ("Even if the [majority shareholders] depleted [the corporation's] assets with the sole purpose of decreasing the value of [the minority shareholder's] stock and destroying his return on his investment, the action would nonetheless be derivative."); *see also Nordberg v. Lord*,

Day & Lord, 107 F.R.D. 692, 698 (S.D.N.Y. 1985) (holding that minority shareholders could not bring individual actions because their injury was not peculiar to them alone but "fell alike" on the shareholders whose fraud had caused the stock value to decline). Even if we were to recognize such an exception, David Manson would not have standing.

The Mansons rely heavily on *Yanow v. Teal Industries, Inc.*, *supra*, 178 Conn. 262, 422 A.2d 311. This Connecticut Supreme Court decision concerning standing to assert a state law claim, however, does not control the instant case, which involves the interpretation of a federal statute and raises important questions of federal policy. There are sound reasons for limiting standing under RICO to plaintiffs whose injuries are personal and directly caused by the RICO violations, particularly when the primary victim of the RICO conspiracy is a corporation.

The proximate cause requirement serves the interests of judicial economy by allowing courts to determine in a derivative action one damage award that will restore the corporation and, therefore, its shareholders, creditors, and employees. "[R]ecognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries". *Holmes v. Securities Investor Protection Corp.*, *supra*, 503 U.S. at ____, 112 S. Ct. at 1318.

Furthermore, the standing requirement prevents some claimants from diverting the corporation's assets from other creditors whose claims have priority. *Mid-State Fertilizer Co. v. Exchange Nat. Bank*, *supra*, 877 F.2d at 1336. This is a particularly important concern in the con-

text of a RICO action brought by a shareholder, where a treble damage award under RICO would impair the rights of prior claimants to the corporation's assets. *Rand v. Anaconda-Ericsson, Inc., supra*, 794 F.2d at 849.

These important policy concerns counsel strongly against a holding that would ease the requirements for standing under RICO. The Mansons essentially claim that the Company was looted, thereby causing the value of David Manson's shares to decline.

Since there is no claim that David Manson sustained injuries that are distinct from those sustained by the corporation or the other shareholder, we hold that David Manson does not have standing as a shareholder.

(3) *Standing As Employee*

The Mansons claim that David Manson has standing to sue as president and director of the Company. Employees of a bankrupt corporation, however, like creditors and shareholders, generally do not have standing under RICO. The employee's injury generally is derivative of that of the corporation and does not satisfy RICO's proximate cause requirement. *Holmes v. Securities Investor Protection Corp., supra*, 503 U.S. at ____, 112 S. Ct. at 1318.

For example, in *Willis v. Lipton*, 947 F.2d 998, 1000-01 (1 Cir. 1991), a chief executive officer of a bankrupt corporation claimed that the defendants' RICO conspiracy caused the loss of his employment, damage to his reputation, and legal expenses. The court held that the chief executive officer did not have standing under RICO because his injuries were the indirect result of RICO violations that were aimed at the corporation by which he was employed. *Id.* Similarly, David Manson's loss of income as president and director is an indirect result of

the conspiracy and subsequent bankruptcy of the Company.

The Mansons also assert that David Manson was injured by appellees' threats, which were made to intimidate him and to stop him from investigating the alleged scheme. These threats were directed at David Manson because of his positions of employment with the Company. The threats, however, were part of a RICO scheme that was directed at the Company, not David Manson. There is no claim that these threats caused David Manson to sustain any direct injury. To the extent that these threats allowed the alleged conspiracy to succeed, only the Company sustained direct injury, and any injury sustained by David Manson as an employee was an indirect result of the Company's injuries.

We hold that David Manson does not have standing as an employee.

(4) *Availability of State Law Remedies*

The Mansons argue that dismissal of the federal RICO claim would leave them unable to obtain a forum for redress, resulting in a manifest fraud and injustice against them. According to the Mansons, the receiver's dismissal of David Manson's derivative action has left them without any state law remedies. David Manson, however, has the right under Connecticut law to challenge the receiver's conduct and to move for the discharge of the receiver. Conn. Gen. Stat. Ann. § 52-513 (West 1991). After discharge of the receiver, David Manson could bring another derivative action. Alternatively, David Manson could request permission of the Superior Court to sue the receiver and hold him liable for his fraudulent actions. *Hartford Federal Savings & Loan Ass'n v. Tucker*, 196

Conn. 172, 178-79, 491 A.2d 1084, 1089, *stay denied*, 474 U.S. 896, *and cert. denied*, 474 U.S. 920 (1985).

The Mansons would prefer to pursue a RICO action in the federal court. David Manson, however, chose to operate his business as a corporation to gain certain advantages. He cannot now avoid the consequences of the corporate structure. One of those consequences is that he does not have standing in his capacity as a creditor, shareholder, or employee of a corporation to assert a RICO claim for injuries that are derivative of those sustained by that corporation. Since the Mansons do have remedies under state law, our holding that they do not have standing to sue under RICO will not result in a manifest fraud or injustice.

(B) *MOTION TO AMEND THE COMPLAINT*

The Mansons argue that the court abused its discretion in denying their motion for leave to amend their complaint to include additional facts related to standing. The Supreme Court has held that, absent bad faith or undue delay on the part of the movant, undue prejudice to the opposing party, or futility of the amendment, a court should grant leave to amend a complaint. *Foman v. Davis*, 371 U.S. 178, 182 (1962). In denying the Mansons' motion, the court held that the motion was moot—that is, that it was futile.

We hold that the Mansons do not have standing to sue under RICO, even under the additional facts related to standing that they plead in their proposed amended complaint. The Mansons' motion for leave to amend their complaint was futile. The court did not abuse its discretion in denying the motion.

III.

To summarize:

The court properly held that the Mansons do not have standing to commence an individual RICO action regarding the looting of a company to which the Mansons are personal obligors on a loan and in which David Manson is a fifty percent shareholder and employee. The court did not abuse its discretion in denying the Mansons' motion for leave to amend their complaint.

Affirmed.

C. RELEVANT RICO STATUTES

§ 1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting,), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to the obstruction of criminal investigations), section 1951 (relating to the obstruction of State or local law enforcement), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering

paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), section 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or

beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interests because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a Sate or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the

usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator as designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative

provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one

percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce,to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections[1] (a), (b), or (c) of this section.

[1] So in original. Probably should be "subsection".

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to

prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but no limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but no limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any persons injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned,and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other

judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

D. RULING ON MOTION FOR REHEARING OF SECOND CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of February one thousand nine hundred and ninety-four.

DAVID MANSON; MARK MANSON,
Plaintiffs-Appellants,

V.

ANCA STACESCU ET AL.
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant's David Manson and Mark Manson.

Upon consideration by the panel that

decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, CLERK

By:_____
Carolyn Clark Campbell
Chief Deputy Clerk